

Dear Ms. Lynne Hewitt Engledow,
Wireline Competition Bureau, Pricing Policy Division
Federal Communications Commission
Proceeding Number 12-375

This comment responds to the FCC's request for comment regarding the legal basis and jurisdictional scope of the Commission's authority to regulate Inmate Calling Services (ICS). Under the Communications Act of 1934 (Act), the Telephone Operator Consumer Services Improvement Act, Pub. L. 101-435 (TOCSIA), and case law construing these statutes, ICS falls within the FCC's jurisdiction to regulation per-minute rate caps for privately and publically-administered facilities.

I. "Just and Reasonable" (47 U.S.C. § 201)

The D.C. Circuit has construed "just and reasonable" under the Act as a more stringent standard than the "commercially reasonable" standard. *Cellco P'ship v. F.C.C.*, 700 F.3d 534, 548 (D.C. Cir. 2012). As such, the D.C. Circuit noted that the FCC's power of intervention under the just and reasonable standard is broader than under the commercially reasonable standard. *Id.* The court stated elsewhere, "the Communications Act gives the FCC broad discretion to determine when 'establish[ing] ... charges' would be 'necessary or desirable in the public interest.'" *MetroPCS California, LLC v. F.C.C.*, 644 F.3d 410, 414 (D.C. Cir. 2011) (citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)).

II. FCC Power under TOCSIA

The Commission considered classifying ICS as "aggregators" under the TOCSIA in 1996. *In the Matter of Amendment of Policies and Rules Concerning Operator Serv. Providers and Call Aggregators*, 1996 WL 94014, 11 F.C.C.R. 4532 (March 5, 1996). The Commission decided that such a classification would be "premature" in light of the special circumstances of prisons. *Id.* However, the Commission presumably had the power to classify ICS as aggregators and thus to regulate certain aspects of the call. Although premature in 1996, classification of ICS as an aggregator may now be appropriate if the Commission finds that ICS rates remain problematic after 17 years.

III. Case Law

The D.C. Circuit held that the FCC has the power to allow intrastate rate-setting by state commissions in *MetroPCS California*. Thus, the current responsibilities of rate-setting are permitted by the Act. The court also affirmed that (1) the FCC may provide guidance to state commission on how to determine reasonable rates and (2) the FCC may depart from this policy through general rulemaking. *Id.* On both points, then, the Commission has the power to set per-minute rates for public and private facilities, provided it gives an adequate basis for the change in agency position. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983). Note that in *State Farm* the requirement of an adequate basis attached to a revocation in a formal regulation. Here, the lack of regulation of ICS is a settled practice, but does not proceed from a formal regulation and the justification needed to establish rate-cap regulations only need to be sufficient to set a regulation in the first instance, with some consideration of why state regulation is not sufficient.

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Sincerely,
Lorenzo Arroyo
Student, Stanford Law School
February 24, 2013